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IN THE

Supreme Court of the United States

October Term, 1970

No. 1371

CESARE VIVIANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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against

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Cesare Viviano, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's convictions for conspiracy to bribe an inspector of the Internal Revenue Service (Count 1, 18 U. S. C. §371) and unlawfully giving a gratuity to the said inspector (Count 3, 18 U. S. C. §201(f)).*

Petitioner was sentenced to concurrent terms of one year and one day on each of the two counts, and has been at liberty since arrest, having posted $1,000 bail.

* Petitioner was acquitted on two counts—giving a bribe (Count 2, 18 U. S. C. §201(b)) and failure to report known violations of the Revenue Laws (Count 4, 26 U. S. C. §7214(a)(8)).

Opinion Below

The opinion below, not yet officially reported, is reprinted in the appendix (App. pp. A1-A10).*

Jurisdiction

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of New York on January 25, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented for Review

1. Whether, as a matter of law, the petitioner, an Internal Revenue Agent, who, as stated in the opinion of the Court of Appeals, was "induced to offer" a bribe and gratuity to an inspector of the Internal Revenue Service, was entrapped into doing so by said inspector who posed as a friend willing to provide information concerning a supposed investigation of petitioner and who (through others) instructed petitioner to pay him for the information.

2. Whether incriminating admissions extracted by a Government agent from petitioner—a prospective defendant and target of an investigation—by the exercise of trickery and deceit, and absent free and rational choice, are admissible in evidence where the warnings set forth in *Miranda* v. *Arizona,* 384 U.S. 438, were not given.

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* Unless otherwise indicated, references are as follows: "App.", to the Appendix to this Petition; "a" to the Appendix in the Court below.

3. Whether the defense of entrapment may be overcome by a finding of "propensity" to commit the crimes charged, where such finding of propensity is based on admissions obtained in violation of petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution.

4. Whether the receipt in evidence of clandestine recordings of petitioner's conversations with a Government agent, violated petitioner's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution.

5. Whether the failure of the Internal Revenue Service to follow its own announced procedures regarding interrogation of suspects deprived petitioner of due process of law.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth and Sixth Amendments to the United States Constitution are here involved, as well as the pertinent portions of 18 U.S.C. §371 and 18 U.S.C. §201(f).

Statement of the Case

Petitioner, an Internal Revenue Agent, did not deny making the payments alleged in the indictment but asserted the defense of entrapment.

Harold Wenig, an Internal Security Inspector of the Internal Revenue Service, acted in an undercover capacity and portrayed the role of a dishonest inspector. He sought to meet petitioner and arranged to do so through the offices of Internal Revenue Agents Sidney Romanoff

and Frederick Weiser.* Some time prior to such meeting Wenig had given Romanoff and Weiser the names of some twenty Revenue Agents who were under investigation, with instructions to contact the agents, tell them that they were under investigation and that Wenig could provide them with valuable information concerning the investigation in exchange for a payment of $100 (later increased to $200).

Through Romanoff and Weiser, Wenig thus notified petitioner that he was under investigation. At Wenig's request, Weiser (1) set up a meeting and (2) told petitioner to pay Wenig $200 at the meeting.

On March 21, 1967, Viviano met with Wenig and Weiser in Wenig's parked car. Unknown to Viviano or Weiser, the automobile was equipped with electronic devices to transmit and record conversations. In Viviano's presence, Wenig and Weiser discussed Weiser's own investigation. The gist of the conversation was that Wenig had been of great help to Weiser. Weiser then left the automobile.

Under the guise of friendship and a desire to help, Wenig interrogated Viviano and got him to admit that he had on one occasion—after completion of an audit—received money from an accountant.

Wenig testified that (1) at this time Viviano was the target of an investigation (32a), (2) it was his purpose to ascertain whether Viviano had taken bribes and (3) it was his further purpose to give Viviano an opportunity to corrupt him (31a). Wenig admitted that his practice

* On January 2, 1970, petitioner's co-conspirator, Weiser, sought review by way of certiorari from the affirmance of his own conviction (*United States* v. *Weiser*, 428 F.2d 932 (2d Cir. 1969), October, 1970 Term, Docket No. 70). Weiser's petition is pending before this Court.

was to get an agent to come to see him and to commit an offense by paying money to him (118a-119a) and it was his intention, in this instance to get Viviano to make admissions of wrongful acts committed in the course of his duties (36a).

At no time did Wenig give petitioner any *Miranda* warnings.

During the course of this meeting, Wenig asked Viviano: "Do you know about the arrangements" (142a). Viviano then gave him $200 stating: "Freddy [Weiser] told me to give you this" (143a).

Subsequent to this meeting there were several telephone calls between Wenig and Viviano. Some, if not all, were recorded. On April 5, 1967, the two again met in Wenig's car. This conversation was also monitored and recorded. During the course of this second meeting, under Wenig's continued interrogation, Viviano admitted that "Maybe on one or two [audits] I received a couple of hundred dollars". On December 13, 1967, Wenig met Viviano for the third and last time, at a restaurant and, in the course of this meeting, Viviano gave Wenig $50.

I.

Petitioner was entrapped as a matter of law.

The holding the court below is in conflict with this Court's holdings in *Sorrells* v. *United States*, 287 U.S. 435 and *Sherman* v. *United States*, 356 U.S. 69. The Court of Appeals here stated (App. A5) "Viviano was induced to offer the bribe and gratuity . . . ".

There is no dispute that the "criminal design" originated with Wenig and other Government agents. Peti-

tioner had no knowledge of any investigation or confidential files, or of an agent who would disclose information as to these matters. It is apparent that he never considered contacting any Government agent for the purpose of obtaining any confidential information from Government files or of paying any sum of money to a Government agent for such purpose until such thought was implanted in his mind by Weiser (relaying information received from Wenig and Romanoff).

There is no evidence that Viviano ever told anyone that he wanted to see or meet with Wenig or Romanoff or obtain any confidential information from Government files—from Wenig or any other source—or that he had any wish or desire to pay money for such information. It was Wenig who made certain that Weiser tell petitioner to pay him (Wenig) the sum of $200 at their first meeting (140a) and thus have petitioner commit the crimes with which he is charged (118a-119a). Wenig played on Viviano's weakness and concern as to an inquiry into his activities. His object was to create a situation wherein Viviano would feel compelled to exchange money for information. He incited the crime for the sole purpose of prosecuting it. As this Court held in *Sherman* v. *United States, supra* (at p. 376), there can be no conviction where the Government

> "plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted."

The practice here utilized by the Government's agent was clearly that of inducing Revenue Agents to violate the law so that they would be prosecuted. This course of conduct runs counter to this Court's views in *Sorrells,*

where the classic statement of Judge Sanborn in *Butts* v. *United States*, 273 Fed. 35, 38 (8th Cir. 1921), is quoted:

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it."

II.

The admissions of petitioner were obtained in violation of the Fifth and Sixth Amendments as construed in applicable decisions of this Court.

The holding of the Court of Appeals for the Second Circuit in this case is in apparent conflict with that of the Seventh Circuit in *United States* v. *Dickerson*, 413 F.2d 1117 (7th Cir. 1969).

The Trial Court held that the petitioner's claim of entrapment failed because the "defendant had the propensity * * * to commit the crimes with which he is charged and to pay the money". As support for its finding of propensity, the Trial Court stated (12a): "The evidence is clear that the defendant had accepted bribes in the past" and, for that reason "was seeking to enlist

Inspector Wenig to obtain information from the Internal Revenue Service confidential files".

The Court of Appeals suggested (App. A7) that "the district court relied on Viviano's spontaneous and unquestioning response to the opportunity to receive information". However, this, as well as all other evidence of alleged propensity is derived from petitioner's incriminatory admissions in response to Wenig's questions. Other than Wenig's testimony as to what Viviano told him, and the tape recordings of their conversations, there was no evidence of the commission of any prior wrongful or improper act by petitioner in his twenty-three years with the Internal Revenue Service.

It is here submitted that such admissions—on which the courts below based their findings of propensity—were obtained in violation of petitioner's constitutional rights under the Fifth and Sixth Amendments, and should have been excluded or suppressed on counsel's timely objection and motion.

At the time Wenig first met petitioner, petitioner was the target of an investigation. Wenig's purpose was to ascertain whether Viviano was a "corrupt agent" and whether he had taken bribes. Specifically, Wenig was seeking to ascertain from petitioner whether he could get him to tell "of any wrongs he had committed" and to "get him to admit * * * anything he did in connection with his duties that was wrong" (36a). Wenig, as a member of the Inspection Service, carried a badge, possessed a weapon and had authority to make an arrest.

Wenig at no time gave petitioner *Miranda* warnings.

The Court of Appeals stated that "one may assume that appellant would not have admitted having taken bribes from taxpayers had he been aware of Wenig's

true purpose . . . " (App. A10). While the Court recognized "an underlying policy favoring statements which are the product of free and rational choice", it held that "no *per se* rule exists which disqualifies all statements not the product of such choice" (App. A9).

It is here submitted that such a rule has indeed existed since this Court decided in *Miranda* v. *Arizona* (384 U.S., at 464-65):

> "The voluntariness doctrine * * * encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice."

Miranda, expresses concern that any incriminatory statements elicited from a suspect should be "truly the product of free choice" (384 U.S., at p. 457).

The interrogation here employed by Wenig was a practice as likely to disable an individual from making a free and rational choice as was the custodial interrogation in *Miranda.*

The Court of Appeals for the Second Circuit has adopted an unduly limited and restrictive view of *Miranda.* Thus, the court below states (App. A9):

> "The purpose of the *Miranda* requirement is to protect a suspect, detained by the police, from coercion effected by the police to compel the suspect to make inculpatory admissions or confessions."

(See, also, to the same effect: *United States* v. *DiLorenzo,* 429 F.2d 216 (2d Cir. 1970), petition certiorari filed August 4, 1970 (Docket No. 496)).

This view is in apparent conflict with that of the Seventh Circuit in *United States* v. *Dickerson*, 413 F.2d 1117 (7th Cir. 1969), where that court held:

> "Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. See 384 U.S. at pp. 475-476, 86 S.Ct. 1602. * * * We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. * * *."

The court below stated by way of footnote (App. A9, fn. 9) that the Seventh Circuit's decision in *Dickerson* "does not differ from our own approach to *Miranda*". This is difficult to understand in view of the Second Circuit's repeated emphasis on custodial interrogation as the mechanism which triggers *Miranda*, and the rejection of such theory by the Seventh Circuit. Additionally, while the Seventh Circuit in *Dickerson* cited with approval *United States* v. *Turzynski*, 268 F.Supp. 847 (N.D.Ill. 1967) (cited at 413 F.2d 1115), the Second Circuit has specifically disapproved *Turzynski* (*United States* v. *Squeri*, 398 F.2d 785 (2d Cir. 1968)).

Since 1966, the Federal and State courts of our nation have struggled to apply the *Miranda* rationale to factual situations not specifically considered by this Court. Such efforts have resulted in inconsistency and uncertainty. As a consequence, much judicial energy has been expended in considering the same question—under what circumstances must an individual be given *Miranda* warnings? Absent clear guidelines, police and other investigatory officers have been left to make their own determinations as to the requirements of *Miranda*, in the hope that trial and appellate courts will validate their opinions.

In this posture, it is respectfully submitted that the time is ripe for this Court to clear the air, resolve the conflicts and remove the uncertainty and unpredictability which have pervaded this area of the criminal law.

On November 9, 1970, this Court granted certiorari in *United States* v. *Romontio*, 39 L.W. 3199, Docket No. 5029. One of the issues there raised is whether *Miranda* warnings must be given an individual who voluntarily attends at the office of a Postal Inspector. By granting the instant petition, additional aspects of *Miranda* may be resolved by this Court.

III.

The clandestine recording and transmitting of petitioner's conversations violated petitioner's rights under the Fourth Amendment.

Petitioner contended below that his intercepted conversations with Wenig constituted an illegal seizure and should have been suppressed. The court below held (App. A8) that petitioner's Fourth Amendment claim was "foreclosed" by its decision in *United States* v. *Kaufer*,

406 F.2d 550 (2d Cir.) aff'd 394 U.S. 458 (1969). *Kaufer* was reaffirmed in *United States* v. *DiLorenzo*, 429 F.2d 216 (2d Cir. 1970), petition for certiorari filed August 4, 1970, Docket No. 496.

The court below recognized (App. A8, fn. 6) that its decisions in *Kaufer* and *DiLorenzo* are in conflict with that of the Seventh Circuit in *United States* v. *White*, 405 F.2d 838 (7th Cir.) (*en banc*), certiorari granted, 394 U.S. 957 (1969), restored to calendar for reargument, 396 U.S. 1035 (1970).

IV.

Petitioner was denied due process of law as a result of the Internal Revenue Service's failure to follow its announced procedure.

By a news release dated October 3, 1967 (IRS News Release No. 897, 7 CCH 1967 Stand. Fed. Tax Rep. ¶6832), the Internal Revenue Service announced that Special Agents of its Intelligence Division must give individuals suspected of criminal tax fraud *Miranda* warnings.

During argument below, the Chief Judge of the Court of Appeals granted petitioner leave to submit, by letter, argument concerning the relevance of this news release and the two cases construing the same. By letter dated November 13, 1970, petitioner urged consideration of the opinions of the Courts of Appeals in *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969) and *United States* v. *Leahey*, F.2d , 8 Cr.L. 2038 (1st Cir., October 7, 1970).

The holdings of these cases are to the effect that it is error to receive a Special Agent's testimony concerning a defendant's incriminating statements where the full

Miranda warnings have not been given. In *Leahey,* the First Circuit held that "due process requires the Internal Revenue Service to follow its announced procedure".

The letter of petitioner's counsel set forth the applicability of the foregoing cases to the testimony of Agent Wenig.

The opinion of the court below makes no mention of petitioner's argument in this regard. If *Heffner* and *Leahey* are applicable, the holding in this case is in conflict with the holdings of the courts of appeals for the First and Fourth Circuits.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 299—September Term, 1970.

(Argued November 11, 1970 Decided January 25, 1971.)

Docket No. 35165

UNITED STATES OF AMERICA,

Appellee,

—v.—

CESARE VIVIANO,

Defendant-Appellant.

Before:

LUMBARD, Chief Judge,
WATERMAN and ANDERSON, *Circuit Judges.*

Defendant appeals from a judgment of conviction in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* for unlawfully offering a gratuity to and conspiring to bribe an inspector of the Internal Revenue Service. Affirmed.

MYRON J. GREENE, Esq., New York, N. Y. (Howard R. Udell, Esq., New York, N. Y., on the brief), *for Appellant.*

ARTHUR A. MUNISTERI, Assistant U. S. Attorney, Southern District of New York (Whitney North Seymour, Jr., U. S. Attorney, and Jack Kaplan, Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

On May 24, 1968 Cesare Viviano was indicted for conspiring to violate 18 U.S.C. §§201(b) and 201(f) by offering a bribe in the amount of two hundred dollars to an inspector of the Internal Revenue Service in exchange for information from the confidential files of the Inspection Service (Count 1, 18 U.S.C. §371), and giving a bribe (Count 2, 18 U.S.C. §201(b)) or, in the alternative, a gratuity (Count 3, 18 U.S.C. §201(f)) in the amount of fifty dollars to an inspector of the Internal Revenue Service. He was also charged with a violation of 26 U.S.C. §7214(a)(8) for failure to report known violations of the Revenue Laws (Count 4). The indictment resulted from an investigation by the Internal Revenue Service into allegations of misconduct among IRS employees. Harold Wenig, an inspector with the Internal Security of the Internal Revenue Service, posed as a corrupt inspector willing to sell information from the files of the Service concerning pending investigations of IRS agents, suspected of having taken bribes from taxpayers.

In the fall of 1966, Frederick Weiser, an IRS agent working in the Mineola, New York district, discovered that

he was under investigation. Sidney Romanoff, a fellow agent who was also under investigation and was obtaining confidential information from Wenig concerning his case, arranged for Weiser to receive like consideration. After his initial contact with Wenig, Weiser performed go-between services for other agents, arranging for them to meet with and purchase information from Wenig.[1]

In March 1967, at the request of Wenig, Sidney Romanoff contacted Weiser and informed him that an investigation was being conducted into the prior audits of Cesare Viviano, an IRS agent working in the same group with Weiser, and that Wenig possessed information that might prove helpful to Viviano. Thereupon Weiser arranged a meeting between Viviano and Wenig for March 21, 1967. Viviano was instructed by Weiser to give Wenig $200 for the information. On the agreed date Viviano, accompanied by Weiser, met Wenig at the Roosevelt Field Shopping Center in Westbury, Long Island. Both entered Wenig's car, but Weiser, after having conversed with Wenig about his own case, left. Wenig, in conferring with Viviano, showed him some records of the information gathered by the IRS in its investigation of his prior audits. Viviano admitted having taken a bribe on several cases, but he could not remember others. Wenig and Viviano exchanged phone numbers, Wenig assigned Viviano a code name, "Victor," and Viviano gave $200 to Wenig. During the

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[1] Frederick Weiser, Viviano's co-conspirator, was convicted in the Southern District of New York of conspiring to bribe, bribing and aiding and abetting three other agents in bribing Inspector Wenig and of failing to report violations of the revenue laws which he knew other agents were committing. That conviction was affirmed by this court on November 13, 1969. *United States* v. *Weiser*, 428 F.2d 932 (2 Cir. 1969).

Sidney Romanoff is under indictment for his activities, but no action had been taken on his indictment at the time of Viviano's trial.

meeting Wenig was equipped with a Kel transmitter, and the car was outfitted with various other electronic devices. In a nearby car, four other inspectors recorded the entire conversation.

On March 30 and April 4, 1967 Wenig and Viviano talked by phone; during the first call, Wenig related that one of Viviano's audits was going to be evaluated by the audit staff, and during the second, another meeting was arranged for April 5 at Roosevelt Field. Both conversations were recorded. At the April 5 meeting, Wenig showed Viviano more information about the investigation and Viviano agreed to a plan whereby, in the future, whenever Wenig possessed information regarding planned investigations of Viviano's audits, he would call Viviano, and, if he had taken a bribe, Viviano would tell Wenig to conduct the interview of the taxpayer alone; if no bribe had been taken, he would tell Wenig to take a partner. Again, Wenig was equipped with a Kel transmitter, and the conversation was recorded. On April 18 and 19, 1967 Wenig and Viviano spoke on the phone, and Viviano indicated that certain audits were "okay." These conversations were also recorded. Their next conversation occurred on December 11, 1967, and at that time Viviano revealed further information about an audit, currently being investigated, for which he had admitted taking a bribe. In a December 13 phone conversation, they agreed to meet for lunch later that day. During lunch, Viviano handed Wenig $50 under the table to show his appreciation for what Wenig had done for him. Both phone conversations and the conversation during lunch were recorded.

On July 16, 17, 18, 1970 the trial took place before the district court sitting without a jury; the defendant had

waived his right to a jury trial. Harold Wenig and Sidney Romanoff, among others, testified at the trial, and the tapes (and transcripts of the tapes) of the various conversations between Wenig and Viviano were introduced into evidence over the objection of counsel for the defendant. Viviano did not testify in his own behalf. He was found guilty of conspiracy to bribe and of offering a gratuity to Harold Wenig in exchange for confidential information from IRS files. He was acquitted on the other two charges. For the reasons hereinafter stated, we affirm.

Judge Learned Hand's discussion of the defense of entrapment in *United States* v. *Sherman*, 200 F.2d 880, 882 (2 Cir. 1952), provides a standard for testing defendant's claim that the defense of entrapment was established as a matter of law.

> "[I]n such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

As the district court found that Viviano was induced to offer the bribe and gratuity [2] and the Government raises no question as to this finding on appeal, the sole question pre-

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[2] The "element [of inducement] goes simply to the Government's initiation of the crime and not to the degree of pressure exerted. . . ." *United States* v. *Riley*, 363 F.2d 955, 958 (2 Cir. 1966); see also *United States* v. *Dehar*, 388 F.2d 430, 433 (2 Cir. 1968); *Sherman* v. *United States*, 200 F.2d at 883. The degree of pressure is properly considered under the element of propensity, as it has direct bearing on the accused's willingness to respond to the inducement of the agent. Cf. *Kadis* v. *United States*, 373 F.2d 370, 373 (1 Cir. 1967).

sented is whether there is sufficient evidence in the record upon which the trial judge could base a finding that the defendant possessed a propensity to offer a bribe and gratuity to Wenig.

Once the defendant demonstrates inducement, the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement. See *Sherman* v. *United States, supra,* at 882; *United States* v. *Becker,* 62 F.2d 1007, 1008 (2 Cir. 1933). Although lacking in evidence of the second category, the record provides ample support for the finding of propensity based on the other two kinds of evidence. Viviano's admissions of having accepted bribes from taxpayers support a finding of his past commission of similar criminal activity and show his awareness of his vulnerability and the strong motive that was his to seize the opportunity to conceal his past misconduct from the authorities.[3] Moreover, any revulsion which may attach to the use of inducement by the police is in good measure nullified here by the fact that the accused was largely "hoist with his own petard."[4] There is no evidence what-

[3] There is no requirement that the evidence of prior criminal conduct be formally the same as the crime charged. It has been said that it is enough that the prior conduct be "morally indistinguishable" from the crime charged and "of the same kind." *United States* v. *Becker, supra,* at 1009; *Sherman* v. *United States,* 200 F.2d at 882.

[4] In *Sorrells* v. *United States,* 287 U.S. 435 (1932), and *Sherman* v. *United States,* 356 U.S. 369 (1958), a majority of the Supreme

(footnote continued on next page)

soever to suggest that Viviano displayed the slightest hesitancy in taking advantage of the solicitation. *United States* v. *Henry*, 417 F.2d 267 (2 Cir. 1969), *cert. denied*, 397 U.S. 953 (1970).

Appellant contends that his admission to the acceptance of bribes from taxpayers is the only evidence tending to support a finding of propensity and that such evidence was improperly admitted in violation of the Fourth Amendment because the interception of his conversations with Wenig was an illegal seizure, and because Wenig failed to give appellant the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in violation of his Fifth and Sixth Amendment rights. It is evident, however, that the district court relied on Viviano's spontaneous and unquestioning response to the opportunity to receive the information—conduct which implied the assumption of his own guilt, *United States* v. *Masciale*, 236 F.2d 601, 603 n. 1 (2 Cir. 1956) *aff'd*, 356 U.S. 386 (1958)—in addition to its reliance on the evidence of the taped conversations.[5] But, even if

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(footnote continued from previous page)

Court felt that the defense of entrapment was theoretically based in the diminished guilt of the defendant, while the minority thought it based in the power of the federal courts to regulate police conduct which was likely to give rise to a miscarriage of justice. See *United States* v. *Becker*, *supra*, at 1009. In *Kadis* v. *United States*, *supra*, at 373, the First Circuit suggested what appears to be a reasonable explanation of the practical relationship between concern for high-handed police tactics and the feeling that entrapment diminishes guilt.

> "Extreme police tactics, for example, of badgering, or making massive appeals to the sympathy of an obviously reluctant person, will mean that as a matter of law the government cannot be found to have sustained its burden of proving that it did not corrupt an innocent or unwilling man."

[5] As the trier of fact, the district judge stated:

> "I find no entrapment because of the defendant's willingness, and indeed eagerness, to make the payments . . . and to enlist Inspector Wenig's cooperation."

the only evidence supporting propensity were the intercepted admissions of taking bribes in the past, that evidence was properly before the court and was sufficient to support the conviction.

Appellant's Fourth Amendment claim is foreclosed by our decision in *United States* v. *Kaufer,* 406 F.2d 550 (2 Cir.) *aff'd,* 394 U.S. 458 (1969), where we held that it was not a violation of the Fourth Amendment to utilize tape recordings of the defendant's conversations obtained with the consent of a party to the conversation. We recently reaffirmed the *Kaufer* decision in *United States* v. *DiLorenzo,* 429 F.2d 216 (2 Cir. 1970), and we adhere to the position announced in those decisions [6] on this appeal, which presents the identical question.[7]

Appellant claims that he was deprived of his Fifth and Sixth Amendment rights because he was not warned of his right to remain silent and to the assistance of counsel pursuant to *Miranda* v. *Arizona, supra,* prior to being interrogated by Wenig, and that Wenig's testimony and the

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[6] In *Kaufer,* we rejected the argument, now urged, that *Katz* v. *United States,* 389 U.S. 347 (1967), overruled *sub silentio, Lopez* v. *United States,* 373 U.S. 427 (1963). With regard to misplaced expectations of privacy we said, "[t]he risk that an unknown third party will intercept and record the conversation, as was done in *Katz,* is obviously of a far different order [than the risk the bribe offer will be reproduced in court by faultless memory or mechanical device, as in *Lopez*]," 406 F.2d at 551-52. See also *United States* v. *Knohl, supra,* at 443. Contra, *United States* v. *White,* 405 F.2d 838 (7 Cir.) (*en banc*), *certiorari granted,* 394 U.S. 957 (1969), restored to calendar for reargument, 396 U.S. 1035 (1970).

[7] That Viviano's admissions were of past criminal conduct rather than statements made during the commission of and in furtherance of a crime, as in *Kaufer,* is not a distinguishing factor, because the Fourth Amendment is concerned with the conduct employed in the interception, not the content of the communication. *United States* v. *DiLorenzo, supra,* at 219 n. 2.

tape recordings, therefore, should have been excluded. Assuming, however, that Wenig's conversations with the appellant constituted "interrogation," *United States* v. *DiLorenzo, supra,* at 219, the circumstances did not call for *Miranda* warnings.

The purpose of the *Miranda* requirement is to protect a suspect, detained by the police, from coercion effected by the police to compel the suspect to make inculpatory admissions or confessions.[8] We have therefore consistently examined each situation presented to determine "whether [the facts disclose] the inherently compulsive aspects which the Supreme Court found to exist in the process of custodial interrogation. . . ." *United States* v. *Caiello,* 420 F.2d 471, 473 (2 Cir. 1969), *cert. denied,* 397 U.S. 1039 (1970); see also *United States* v. *White,* 417 F.2d 89 (2 Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); *United States* v. *Squeri,* 398 F.2d 785 (2 Cir. 1968).[9] While this attests to an underlying policy favoring statements which are the product of free and rational choice, no *per se* rule exists

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[8] We do not read *Massiah* v. *United States,* 377 U.S. 201 (1964), to suggest that the rationale of *Miranda* rests on grounds other than the coercive effects of custodial interrogation. *Hoffa* v. *United States,* 385 U.S. 293, 303-04 (1966); *United States* v. *Knohl, supra* at 442; cf. *United States* v. *DiLorenzo, supra,* at 219.

[9] Contrary to appellant's assertions, the Seventh Circuit's decision in *United States* v. *Dickerson,* 413 F.2d 1111 (7 Cir. 1969), does not differ from our own approach to *Miranda.* In *Dickerson,* the Seventh Circuit held that IRS agents investigating individual tax returns must give the taxpayer *Miranda* warnings at the first contact with the taxpayer after the investigation has become a criminal investigation, a result contrary to our own in *United States* v. *Squeri, supra.* Rather than rely on whatever deceit may have been employed by the agents in *Dickerson* as grounds for imposing the *Miranda* warnings, however, the court emphasized and relied upon the adversarial nature of a tax investigation and the inherent coercion exerted on the taxpayer by such investigations, *id.* at 1116, an evaluation with which we disagree.

which disqualifies all statements not the product of such choice. It is only when inculpatory statements are made in a context in which rationality and free choice are likely to be overborne by the Government's investigatory or prosecutorial agents or authority that *Miranda* comes into play. See *United States* v. *DiLorenzo, supra,* at 219; *United States* v. *Squeri, supra,* at 789; *United States* v. *Knohl,* 379 F.2d 427, 442 (2 Cir.), *cert. denied,* 389 U.S. 973 (1967).

While one may assume that appellant would not have admitted having taken bribes from taxpayers had he been aware of Wenig's true purpose, this does not mean that Viviano should have been given the *Miranda* warnings. He was not in a situation where he was impelled through weariness or fear of further pressure to say what his interrogator wanted him to say or to make inculpatory admissions, whether true or not, to stop the police from badgering him and leave him alone. He was under no police compulsion to meet with Wenig. Once there he was free to say nothing or leave any time he chose. The real inducing cause of his making self-incriminating statements was his eagerness to avail himself of a chance to conceal his past delictions.

We hold, therefore, that the district court properly admitted the testimony of Harold Wenig and the tape recordings of his conversations with appellant and that it correctly found the Government had met its burden of establishing appellant's propensity to bribe Harold Wenig.

Affirmed.

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of January one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

CESARE VIVIANO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1371

CESARE VIVIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1961. The petition for a writ of certiorari was filed on February 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether petitioner's Fifth and Sixth Amendment rights were violated when a government agent, who was posing as corruptible, engaged him in conversation leading to incriminating statements.

3. Whether admission into evidence of tape recordings of conversations between petitioner and the government agent, who testified at trial, violated petitioner's Fourth Amendment rights.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of paying an unlawful gratuity to an Internal Revenue Service inspector, in violation of 18 U.S.C. 201(f), and of conspiring to pay a bribe and an unlawful gratuity, in violation of 18 U.S.C. 371. He received concurrent sentences of one year and one day on each count. The court of appeals affirmed (Pet. App. A11).

The evidence at trial showed that during the spring of 1967 Harold Wenig, an agent with the Inspection Service of the Internal Revenue Service, posed as a dishonest inspector willing to sell information about an investigation of a clique of corrupt agents in the Brooklyn, New York district (App. 20a-21a, 107a-108a).[1] Wenig gave agents Frederick Weiser[2] and

[1] "App" refers to the printed appendix in the court of appeals, which is on file with the Clerk of this court.

[2] Weiser, who was indicted as petitioner's co-conspirator, was convicted in the Southern District of New York on eight counts of conspiracy to bribe, bribery and failing to report violations of revenue laws. The court of appeals affirmed. 428 F. 2d 932 (C.A. 2). Weiser's petition for a writ of certiorari is pending before this Court, No. 70, this Term.

Sidney Romanoff, both of whom believed him to be dishonest, the names of agents under investigation by the Inspection Service. Weiser and Romanoff would inform these agents that the Inspection Service was looking into their activities, and that for $100 (later $200) Inspector Wenig would sell them information about pending investigations (App. 117a, 120a). Agents used code names in communicating with Wenig through a telephone answering service he maintained under the name "Springer" (App. 50a-51a).

On March 14, 1967, Wenig told Romanoff that petitioner, an agent in the Mineola, Long Island office, was under investigation. Romanoff said that he did not know petitioner very well, but that Weiser, who worked in the Mineola office, did (App. 21a-23a). The next day Weiser mentioned petitioner when talking to Wenig on another matter. Weiser assured Wenig that petitioner was "one of the boys, 100 percent." He said that he would speak to petitioner and try to arrange a meeting between Wenig and petitioner for the following week (App. 24a-26a). A few days later, Weiser reported that petitioner had agreed to meet Wenig the next day at the Roosevelt Field Shopping Center in Westbury, Long Island, and that petitioner had been apprised of the usual "financial arrangements" (App. 26a-27a).

The following day, March 21, Wenig drove his automobile to Roosevelt Field and met Weiser and petitioner at the shopping center. After introductions and a brief conversation, Weiser left and petitioner got into the front seat next to Wenig. Wenig told petitioner that the Inspection Service had information that bribes had been paid in connection with an audit of the

income tax returns of Arthur and Lucille Debevoise. Petitioner said that he remembered having conducted that audit and recalled that the taxpayers' accountant was one Herbert Goodman (App. 41a). Wenig enumerated various suspected irregularities in the Debevoise return and petitioner acknowledged that Goodman had paid him $1,000 or $1,500 to overlook them (App. 42a, 48a-49a). Wenig asked petitioner whether anyone else knew of the bribe from Goodman. Petitioner replied that he "wasn't stupid enough to do it in front of witnesses" (App. 48a). Petitioner asked Wenig whether he should warn Goodman of the inspection. Wenig told petitioner that this would be foolish because Goodman might be under surveillance (App. 50a-51a). Before they parted petitioner handed Wenig $200 in cash and remarked that Weiser had instructed him to do this (App. 52a).

About ten days later, Wenig informed petitioner by telephone that his audit of the Debevoise returns was being sent to Brooklyn for an evaluation by the audit staff. Petitioner told Wenig that he knew the Assistant Chief of Audit in Brooklyn and would attempt to contact him with respect to the upcoming review of the audit (App. 53a-54a). A few days later petitioner reported to Wenig that he had met the Assistant Chief of Audit by chance and alerted him to expect the Debevoise audit for evaluation (App. 64a).

On April 5, petitioner and Wenig again met at the Roosevelt Field Shopping center (App. 56a). In Wenig's car, Wenig showed petitioner Xerox copies of documents from the confidential files of the Inspection

Service (App. 57a-58a), representing prior audits that petitioner had conducted. Wenig told petitioner that inspectors planned to interview the taxpayers involved in some of these audits to determine whether any bribes had been paid (App. 58a-59a). Petitioner examined the papers and indicated which audits had involved bribes. Wenig said that he would arrange to be the only inspector to interview the taxpayers in these cases, so that no evidence of petitioner's wrongdoing would come to light (59a-61a).

Petitioner and Wenig had further telephone conversations about two weeks later. Wenig mentioned some additional audits that were being checked by the Inspection Service, and petitioner indicated that they were "O.K." (App. 68a-69a).

For the next eight months petitioner and Wenig did not communicate with each other. On December 11, 1967 petitioner telephoned Wenig. Wenig returned the call and told petitioner that the Debevoise investigation was still "hot" (App. 70a-71a). Petitioner telephoned again two days later and Wenig returned the call. Petitioner told Wenig that in view of the approaching holiday season, he would like to show his appreciation for all Wenig had done for him (App. 74a-75a). That same afternoon petitioner and Wenig met for a third time. During lunch in a Manhattan restaurant petitioner told Wenig that the "fellows out at the Mineola office" appreciated him (App. 76a-80a). Near the end of the meal petitioner reached under the table and handed Wenig a $50 bill (App. 84a).

At each of his three meetings with petitioner, Wenig

wore a concealed transmitter which was monitored and recorded by other inspectors (App. 28a-29a, 56a, 76a-77a). Wenig's automobile was equipped with hidden tape recorders which transcribed his two meetings with petitioner in that vehicle (App. 29a, 56a). In addition, Wenig recorded his December telephone conversations with petitioner (70a, 74a). At the conclusion of Wenig's direct testimony, the tape recordings and transcripts made from them were received into evidence (App. 91a-93a).

ARGUMENT

1. As in the case of his co-conspirator Weiser, whose petition for a writ of certiorari is pending as No. 70, this term, the court of appeals correctly held that petitioner was not entrapped as a matter of law (Pet. App. A5-A8). We do not dispute the court's conclusion that Wenig offered an inducement to commit the offenses charged. Obviously petitioner would neither have conspired to bribe inspector Wenig nor have paid him an unlawful gratuity if Wenig had not posed as a corrupt inspector and passed the word that petitioner was under investigation. But to establish entrapment as a matter of law, the evidence must show more than that government agents afforded opportunities and facilities for the commission of the offense. *Osborn* v. *United States,* 385 U.S. 323, 331-332; *Sherman* v. *United States,* 356 U.S. 369, 372; *Sorrells* v. *United States,* 287 U.S. 435, 441. For entrapment to occur government agents must implant in the mind of an innocent person, as by persuasion or persistent solicitation, the disposi-

tion to commit the alleged offense. *Sherman, supra,* 356 U.S. at 372; *Sorrells, supra,* 287 U.S. at 442.

Here Wenig, the government agent, exerted no pressure upon petitioner. Petitioner was subjected to neither repeated solicitation nor appeals for sympathy. See *Sherman, supra,* 356 U.S. at 372. Wenig simply told Romanoff that petitioner was under investigation. Romanoff apparently told this to Weiser, who passed the word to petitioner along with the information that Wenig had helped other agents in similar predicaments for $200. The evidence reveals not the slightest hesitancy on petitioner's part in accepting Wenig's implied offer. See *United States* v. *Henry,* 417 F. 2d 267, 270 (C.A. 2), certiorari denied, 397 U.S. 953. And petitioner took the initiative in subsequent phases of his dealings with Wenig.

2. Relying on *Miranda* v. *Arizona,* 384 U.S. 436, petitioner argues that his statements to Wenig were not admissible because Wenig did not advise him of his right to remain silent and to have an attorney present. The *Miranda* decision does not apply to statements made in the course of committing an ongoing crime. *Wallace* v. *United States,* 412 F. 2d 1097 (C.A.D.C.), pending on petition for a writ of certiorari, No. 37, this Term. Believing Wenig to be corrupt, petitioner felt no trepidation in his presence; his statements to Wenig were "wholly voluntary" and not "the product of any sort of coercion." *Hoffa* v. *United States,* 385 U.S. 293, 304. For the same reason, *United States* v. *Dickerson,* 413 F. 2d 1111 (C.A. 7), dealing with noncustodial questioning by IRS agents investigating indi-